Supreme Court, U.S.
FILED

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

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STANLEY HUNKINS, individually
and d/b/a Muse Ten Center, et al.,

Petitioners,

vs.

CITY OF MINNEAPOLIS,
THE MINNEAPOLIS COMMUNITY DEVLOPMENT
AGENCY, and MINNESOTA TECHNOLOGY
CORRIDOR CORPORATION,

Respondents.

==========

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

==========

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QUESTIONS PRESENTED FOR REVIEW

I: Where the City of Minneapolis and the Minneapolis Community Development Agency and the Minnesota Technology Corridor Corporation had associated together to down-zone an area to benefit their own joint enterprise, whether the marked diminution in value of the property value of the Muse Ten Center on account of the down-zoning constitutes a compensable taking of private property under the Constitution of the United States and its jurisprudence?

II: Whether a political entity must inform a property-holder of the process necessary to obtain a variance where the political entity downzones property?

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Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).

Pratt v. State Department of Natural Resources, 309 N.W.2d 767 (Minn. 1981).

United States Constitution, 5th Amendment

OPINIONS BELOW

This Petition seeks review of the Order of the Supreme Court of the State of Minnesota declining review, Hunkins et al. v. City Minneapolis et al., CX-93-1009, and the reported underlying Minnesota Court of Appeals' decision, Stanley Hunkins, individually and d/b/a Muse Ten Center et al. v. City Minneapolis, The Minneapolis Community Development Agency, and Minnesota Technology Corridor Corporation, 508 N.W.2d 542 (Minn. Ct. App 1993). Each of these decisions has been reprinted in the Appendix.

STATEMENT OF JURISDICTION

Petitioner Stanley Hunkins and Corridor Properties seek review of the decision of the Minnesota Court of Appeals, filed November 23, 1993, and the denial of review by the Supreme Court of the State of Minnesota, January 27, 1994. This Supreme Court of the United States has jurisdiction based on 28 U.S.C, Section 1257.

STATEMENT OF THE CASE

This case first came to the Minnesota Court of Appeals from

the district court's grant of summary judgment based on Stanley Hunkins' failure to obtain a final determination by the zoning board for the City of Minneapolis. The Court of Appeals held Hunkins could not demonstrate that the zoning regulation would have an economic impact on his property. Hunkins et al. v. City of Minneapolis et al., 508 N.W.2d 542 (Minn. Ct. App. 1993).

The Minnesota Supreme Court did not grant the Petition for a Writ of Certiorari brought by Hunkins, Appellate Case No. CX-93-1009.

QUESTIONS PRESENTED FOR REVIEW

I: Where the City of Minneapolis and the Minneapolis Community Development Agency and the Minnesota Technology Corridor Corporation had associated together to down-zone an area to benefit their own joint enterprise, whether the marked diminution in value of the property value of the Muse Ten Center on account of the down-zoning constitutes a compensable taking of private property under the Constitution of the United States and its jurisprudence?

II: Whether a political entity must inform a property-holder of the process necessary to obtain a variance where the political entity downzones property?

STATEMENT OF FACTS

Stanley Hunkins launched his efforts to develop the Muse Ten Center as a business incubator in 1983. Two adjoining parcels

were purchased; and Hunkins received a building permit from the City of Minneapolis. In late 1984, the Muse Ten Center opened, but the rehabbing of the second parcel had not been completed.

Shortly afterwards, the City of Minneapolis applied to the State of Minnesota for an Enterprise Zone status encompassing the area where the Muse Ten Center was situated. In such an Enterprise Zone, government entities work together to develop specified areas.

On December 19, 1986, the Minneapolis City Council enacted Chapters 570, 571, and 572 of the Minneapolis Zoning Code. This zoning created the Minnesota Technology Corridor and severely restricted land use within the Corridor by the creation of districts restricted to technology-intensive uses and commercial uses supportive of technology intensive use.

Stanley Hunkins submitted no formal petition for rezoning; neither did he fill out a "permitted use" application or submit an application for a variance. Hunkins Deposition, pages 49-50; Hamborg Deposition, pages 263-65. However, Hunkins and

Randall Hamborg repeatedly asked the City to reconsider its zoning in the Corridor, before and well after the zoning had been implemented.

A Technology Corridor informational brochure emphasizes that the Corridor is "...a joint effort of City and University..." and that the Corridor

> should have [the] goal of limited 'land bank' to be able to market Corridor property as available and to be able to respond quickly. To facilitate this goal and improve financial feasibility, [the Corridor] should stay aware of real estate that is available and try to acquire available property for land bank rather than using condemnation.

On November 20, 1985, Charles Arnason of the MTCC distributed a Memorandum on Land/Use Development Control:

> It is highly desirable and, in fact, may be described as imperative, that some type of control be imposed on the real estate located in the Minnesota Technology Corridor. As development occurs, current owners, as well as speculators, will seek to profit from the increased valuation of the real estate, made so by the enhancement of the Project and the neighborhood. Set forth herein are alternatives to be considered:
>
> 1. City of Minneapolis zoning. . . .
>
> * * *
>
> 6. Involuntary control of the premises-condemnation.... It is acknowledged that condemnation is the least desirable method of acquisition....

The City of Minneapolis approved a 12-month and then an additional 6-month building moratorium in the Technology Corridor from early 1986 through mid-1987.

A June 1986 newsletter published by the MCDA described the Technology Corridor as "a joint venture by the City of Minneapolis, the State of Minnesota, the University of Minnesota and private businesses."

The Secor Study, study sponsored by the MCDA and the MTCC to assist the development of a Technology Corridor, recommended that the City zone the Corridor restrictively to impede development so that the land would inexorably revert to ownership by the City of Minneapolis because the property could not cash flow in its current private hands. The Secor Study also indicated that the Technology Corridor had to compete with cheap land in outlying areas. Id. at 64. A-111.

> Zoning an area as District T will have the effect of putting it under the effective control of the City of Minneapolis. Given the competition from industrial parks in suburban areas, the value of the land zoned District T will be much lower than the land elsewhere at the fringe of the [Central Business District]. Thus all of the land zoned District T will fall under the

effective planning authority of the MCDA.

Zoning fashioned to depress land values is known as "downzoning."

The Secor Study anticipated the MCDA's and the City's "effective control" of the Technology Corridor, that is, the City and its partners would ultimately enjoy the advantages of owning most of the property in the Corridor but without having paid any of the interim costs of ownership, including, at a minimum, purchase costs, paying taxes, maintenance expenses.

In March 1987, the Minneapolis City Council adopted the objectives set forth in the Secor Study.

On July 24, 1987, Hunkins' lender, United Federal Savings Bank, withdrew its financing from the Muse Ten Center in large part on account of the zoning:

> Despite the fine quality of your existing project we have several concerns that I believe would operate causing [the Bank] to decline further [loan] renewal requests:
>
> 1. The project will not make economic sense and will not cash flow until the 240 building is rehabbed and leased. . . .
> 2. From the standpoint of a mortgagee, the proposed zoning changes to Hi-Tech Use are negative. Such

> restrictions would decrease the flexibility of use for the building and ultimately decrease its market value as a result. If we ever had to foreclose on the property we would not want to be bound by such restrictions. . . .

Exhibit V2, A-120.

Hunkins had already put in excess of $6,000,000, into the Muse Ten Center. His losses were more than four million dollars at the time of his sale to Randall Hamborg.

Herb Johnson, an official with the Minnesota Technology Corridor Corporation, continued his acknowledged designs to havethe Muse Ten Center owned by that entity: "[Taking over the MuseTen building] would cost the County nothing and would bring in increasing property taxes over time. Not a bad deal, I would say."

The Liquor Depot, across the street from the Muse Ten Center, asked for a change in zoning which was rebuffed:

> "...The Board of Directors of the Minnesota Technology Corridor Corporation hereby opposes any change in the current zoning in the Technology Corridor as detrimental to the future development and the maintenance of the integrity of the corridor concept...."

In a 1991 status report, Johnson admitted that significant

firms were leaving the Corridor and the opportunities were being "snapped up" by the University:

> I am happy to report that the MCDA is purchasing the [Chicago & Northwestern Railroad] property for future development (at a fraction of their initial asking price of $15 per square foot). This will facilitate the River Road and offer some excellent development opportunities for the "right" kind of companies. I see the recent leavings as opportunities to provide low-cost space to the "right" kind of companies. MCDA will assist by listing them but not in actively marketing them.

City employees, including Nordrum, conceded that the Technology Corridor downzoning would "be a disaster to anyone that owned property [there]...."

Stanley Hankins and Randall Hamborg forfeited their property rights in the Muse Ten Center when the property taxes could not be paid. The Muse Ten Center, as planned, came to the City of Minneapolis, the MCDA, the Minneapolis Technology Corridor Corporation, and the University of Minnesota.

ARGUMENT

I: Where the City of Minneapolis, the Minneapolis Community Development Agency, and the University of Minnesota had acted in concert as the Minnesota Technology

Corridor Corporation to down-zone an area to benefit their own joint enterprise, whether the marked diminution in value of the property value of the Muse Ten Center on account of the down-zoning constitutes a compensable taking of private property under the Constitution of the United States and its jurisprudence?

The Minnesota Supreme Court itself has described various situations where zoning ordinances are presumptively invalid:

> Municipal zoning ordinances affecting interests in real property are authorized only by virtue of an exercise of the police power of a municipality, and must be in the interests of public health, safety, or welfare. [Citations omitted.] They are invalid...where it is established that they are discriminatory as applied to a particular situation. [Citations omitted.] They cannot rest upon an intent to protect enterprises from competition in some particular district; or to create monopolies therein; or to make certain areas subservient to others.

Pearce v. Village of Edina, 118 N.W.2d 659 (Minn. 1962).

Where the entity enacting the zoning restricts development to promote the entity's own venture, then a compensable taking has occurred.

In McShane v. City of Faribault, 292 N.W>2d 253, 258 (Minn. 1980), the Minnesota Supreme Court defined the critical difference between an "arbitration use" and an "enterprise use" in the context of zoning:

> In this case, however, the ordinance was not an "arbitration" of competing land uses but a regulation for the sole benefit of a governmental enterprise—the Faribault Municipal Airport. A number of authors, including Professor Sax, have argued that where a specific governmental enterprise is involved, the burden of its activities falls on just a few individuals while the public as a whole receives the advantage of property right for which it did not pay. In essence, the public has appropriated an easement. In such cases, these writers conclude, the burden on the landowner is grossly disproportionate to the burden he should be expected to bear as an ordinary citizen, and the use of regulation to take his property rights is, in effect, a shortcut to avoid compensation. Therefore, even though the burdened property retains some reasonable usefulness, the public should pay for the diminution in value just as any private landowner must purchase an easement. Sax, **Takings and the Police Power, supra;** Comment, **Airport Approach Zoning: Ad Coelum Rejuvenated,** 12 UCLA L.Rev. 1451 (1965); 1 Rathkopf, **The Law of Zoning & Planning,** & 6.12(1979); 2 Anderson, **American Law of Zoning,** && 12.34, 12.35 (1976); 2 Nichols, **Law of Eminent Domain,** & 6.35 (1979).

McShane also held that the landowner did not have to obtain a variance before bringing suit. McShane at 256.

Most importantly, McShane, op. cit., discusses the distinction between "arbitration" and "enterprise" zoning. As this United States Supreme Court is well aware, this distinction comes from **Penn Central Transportation Co. v. New York City,** 438 U.S. 104 (1978), a Fifth Amendment analysis. The Supreme

Court concluded that a landmark preservation ordinance was not related to a governmental enterprise and therefore did not constitute a taking so long as it permitted some use of the property which would yield a reasonable return on investment. Also, the Court noted the zoning in Penn Central, citing 2 Rathkopf, The Law of Zoning and Planning, 26-4 and 26-4—26-5, n. 6 (2d e. 1977), did not constitute a land use decision that had arbitrarily singled out a particular parcel for different, less favorable treatment than adjoining parcels.

The enterprise test applies when a regulation burdens land owned by a few individuals to benefit a specific governmental enterprise which serves the public. The arbitration test comes into play when no specific government enterprise benefits, and the government simply arbitrates between competing land uses. The facts in Hunkins parallel those in McShane, op. cit., and the Penn Central enterprise test applies. There is no question but that the partners in the Minneapolis Technology Corridor Corporation intended to benefit their own interests rather than those of City of Minneapolis as a whole. No one claimed the Technology Corridor to be an integral part of any comprehensive

zoning plan. The downzoning of the Muse Ten Center aimed to shatter private property values, which under the Penn Central analysis stands as a compensable taking.

In Pratt v. State Department of Natural Resources, 309 N.W.2d 767 (Minn. 1981), the Minnesota Supreme Court also held:

> We think that here, where the governmental enterprise function is **prominent**, a taking may occur if the landowner's property is substantially diminished in value.
>
> * * *
>
> This impairment, if substantial, would disproportionately burden an individual property owner for the benefit of the public in the furtherance, at least in part, of a governmental enterprise.
>
> We therefore hold that the...regulation here at issue, as it has both prominent arbitration and governmental enterprise functions and may unequally and disproportionately affect Pratt's property, may constitute a taking. A taking occurs if there is a substantial diminution in the market value of the property as a result of the regulation.

In the present Hunkins situation, there may a measured arbitration function, where reciprocal benefits and burdens are equitably applied. However, the consumate function of the Technology Corridor zoning relates to the governmental enterprise in developing the Technology Corridor. The taking that Hunkins has suffered is the loss of his purchase price,

development and construction costs, and, finally, loss of the expected appreciation in value of the Muse Ten Center.

The actual system developed by the City of Minneapolis, the Technology Corridor Corporation, and the Minneapolis Community Development Agency had the effect of taking property from Stanley Hunkins for the benefit of others. The United States Supreme Court decried such an effect in Logan v. Zimmerman Brush Co. et al., 455 U.S. 422, 436 (1981):

> Here, in contrast, it is the state system itself that destroys a complainant's property interest, by operation of law...whether the [] action is taken through negligence, maliciousness, or otherwise. ... Logan is challenging not the Commission's error, but the "established state procedure" that destroys his entitlement without according him proper procedural safeguards.

[Emphasis added.]

The City of Minneapolis determined to downzone in order to acquire the property it wanted in the Technology Corridor. One could, with the Secor Study in hand, predict what would happen to Stanley Hunkins. Hunkins' Muse Ten Center land would, under the Technology Corridor's restrictive zoning conditions, fail to cash-flow or fail to attract buyers. Only the short step to

abandoning one's property to the City or the short step to losing the land for failure to pay property taxes remained.

It is clear from the facts presented to the lower Court that the City of Minneapolis, the Minneapolis Community Development Agency, and the Minnesota Technology Corridor, downzoned the Technology Corridor area to achieve their own joint enterprise and to take property, in whole on in part, without payment.

The Minnesota Court of Appeals acknowledged that "[a]t trial and in [the appeal to the Minnesota Court of Appeals], Hunkins correctly argued that, under these facts, the City acted in an enterprise capacity." Appendix at *****. [Emphasis added.] The Minnesota Court of Appeals then stated that this had no bearing.

Such a conclusion cannot be allowed by this United States Supreme Court.

II: Whether a political entity must inform a property-holder of the process necessary to obtain a variance where the political entity downzones property?

Due process demands that a person whose property stands at

risk must be notified by a governmental agency which intends to take the property of the process necessary to obtain administrative relief:

> When a government agency knows that its action will deprive an individual of a property right, the agency must notify that person prior to the deprivation. The notice must include statements "reasonably calculated" to inform the private person of the availability of a process by which he might contest the proposed government action. **See Memphis Light, Gas & Water Division v. Craft,** 436 U.S. 1, 13, 98 S.Ct. 1554, 1562, 56 L.Ed.2d 30 (1978).

Eisen v. State Department of Public Welfare, 352 N.W.2d 731, 736 (Minn. 1984).

Defendants provided no documentation to the District Court indicative of any process available to Hunkins to get a variance. It is apparent that the MCDA, the MTCC, and the City did not, under any circumstances, desire that their zoning be reformed or be questioned.

CONCLUSION

The Minnesota Court of Appeals decision should be reversed on the grounds that the decision in Hunkins et al. v. City of Minneapolis et al. contradicts case law from the United States

Supreme Court and the Minnesota Supreme Court.

The writ for certiorari should issue.

Dated at Minneapolis, Minnesota, this_____day of April, 1994.

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APPENDIX

STATE OF MINNESOTA

IN SUPREME COURT

CX-93-1009

Stanley Hunkins, Individually and
d/b/a Muse Ten Center, et al.,

Appellants,

vs.

City of Minneapolis,

Respondent,

The Minneapolis Community Development
Agency,

Respondent,

Minnesota Technology Corridor Corporation,

Respondent.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Stanley Hunkins for further review
be, and the same is, denied.

DATED: January 27, 1994 BY THE COURT:

STATE OF MINNESOTA
IN COURT OF APPEALS

CX-93-1009

Hennepin County
District Court File No. 9121459

Stanley Hunkins, individually and d/b/a Muse Ten Center, et al., Appellants, vs.	Lawrence H. Crosby Clem & Crosby Suite 130 313 Southeast Fifth Street Minneapolis, MN 55414
City of Minneapolis, Respondent,	Robert J. Alfton Minneapolis City Attorney Michael T. Norton Assistant City Attorney 300 Lincoln Centre 333 South Seventh Street Minneapolis, MN 55402-2453
The Minneapolis Community Development Agency, Respondent,	James R. Dorsey Marc D. Simpson Leonard, Street & Deinard 150 South Fifth Street, Suite 2300 Minneapolis, MN 55402
Minnesota Technology Corridor Corporation, Respondent.	Corey J. Ayling Eileen A. Beckett McGrann, Shea, Franzen, Carnival, Straughn & Lamb, Chartered 2200 LaSalle Plaza 800 LaSalle Avenue Minneapolis, MN 55402

Filed November 23, 1993
Office of Appellate Courts

SYLLABUS

A property owner cannot pursue inverse condemnation without first obtaining final determination of how zoning regulation affects property.

Affirmed.

Considered and decided by Randall, Presiding Judge, Kalitowski, Judge, and Davies, Judge.

OPINION

DAVIES, Judge

In this inverse condemnation action, Stanley Hunkins appeals from the district court's grant of summary judgment to respondents City of Minneapolis, Minneapolis Community Development Agency, and Minnesota Technology Corridor Corporation. The district court found that, because Hunkins had failed to obtain a final determination from the City's zoning board, he could not establish that the zoning regulation would have an economic impact on his property. The court, therefore,

refused to reach the merits of Hunkins, inverse condemnation claim. We affirm.

FACTS

In 1983, Hunkins purchased two parcels of land in the Industry Square Development area of Minneapolis. He contemplated renovating two existing buildings into a "business incubator" office complex where fledgling companies could lease office space and have access to on-site support services. Hunkins called his complex the "Muse Ten."

At the same time, the City commissioned a task force to recommend plans for a comprehensive, revitalization project in the Industry Square area, to be known as the "Technology Corridor." Hunkins' property occupied a portion of the Technology Corridor.

The City did not adopt the task force's recommendation report until February 1985. By that time, the Muse Ten complex had opened its doors. A year later, in response to concerns about protecting the area's development scheme, the City approved a 12-month building permit moratorium so that it

could study possible rezoning. The City later extended the moratorium into mid-1987. The City allowed Hunkins to continue renovation of his property during the moratorium, however, and even issued him a building permit.

Before any rezoning occurred, the City asked the Minnesota Technology Corridor Corporation (MTCC) and Minneapolis Community Development Agency (MCDA) to assist in the development of the Technology Corridor. The MTCC/MCDA's report emerged in December 1986 and proposed using a single developer and recommended rezoning the area.

In December 1986, the City adopted zoning ordinances consistent with the Technology Corridor's zoning requirements, establishing two distinct zones: (1) the "T" zone, allowing technology intensive uses only; and (2) the "TC" zone, allowing commercial uses supportive of technology intensive uses. Hunkins' Muse Ten property fell within the "TC" zone. The City viewed the businesses then operating in the Muse Ten complex as legal nonconforming uses and set up a special procedure for owners of those properties to apply for zoning

determinations.

Before the City enacted the zoning ordinances, Hunkins began experiencing financial difficulties. In April 1987, a judgment for unpaid property taxes was entered against Hunkins. Several months later, Hunkins' lender withdrew its financial backing. Now he claims the lender withdrew in part because of the proposed zoning changes. Although he registered his objections with a variety of city personnel, Hunkins never requested a variance or special use permit from the City. Nor did he ever seek to enjoin the enactment or enforcement of the ordinances.

In April 1991, the Muse Ten property forfeited to the state for nonpayment of 1986 property taxes.

ISSUE

May a district court refuse to decide a property owner's takings claim where the owner has not sought a final determination regarding application of the zoning to the property?

ANALYSIS

On appeal from a summary judgment, this court must determine

(1) whether there are any genuine issues of material fact and

(2) whether the district court erred in its application of the law. Offerdahl v. University of Minn. Hosps. & Clinics, 426 N.W.2d 425, 427 (Minn. 1988). At trial, no one disputed that Hunkins had failed to obtain a final determination as to the effect of the zoning on his property. In finding that Hunkins' inaction was fatal to his takings claim, the district court correctly ruled that Hunkins, claim was premature. Whether a zoning regulation has gone too far cannot be measured

> until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 191, 105 S. Ct. 3108, 3119 (1985). The United States Supreme Court has clearly established this finality requirement, noting that the Court's cases

> "uniformly reflect an insistence on knowing the nature and

> extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it."

Lucas v. South Carolina Coastal Council, ___ U.S.___,__112 S. Ct. 2886, 2891 (1992) (quoting MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 351, ____ S. Ct.____ (1986)).

This court has also dealt with the finality requirement. Citing Williamson and MacDonald, this court found that

> [e]conomic impact and interference with expectation interests cannot be evaluated until after a final application of the regulations to the land in question.

Thompson v. City of Red Wing, 455 N.W.2d 512, 516 (Minn. App. 1990), pet. for rev. denied (Minn. June 26, 1990).

In addition, a "takings claim is not ripe when the landowners have not submitted a development plan.,, Thompson, 455 N.W.2d at 516 (citing Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S. Ct. 2138, 2141 (1980)). Moreover, a landowner's takings claim is not ripe even "where only one plan is rejected and no other plan is proposed." Id. (citing Penn Central Transo. Co. v. City of New York, 438 U.S. 104, 136-37, 98 S. Ct. 2646, 2665-66 (1978)).

Now, six years after the City enacted the zoning ordinances and two years after the property forfeited to the state, Hunkins attempts to draw a causal link between the zoning restrictions and the demise of his development. He contends that the City's actions, in conjunction with the MCDA and the MTCC, constituted a final determination and that requesting a variance or special use permit would have been futile. As authority for this defense, Hunkins cites the Minnesota Supreme Court's holding that "administrative remedies need not be pursued if it would be futile to do so." McShane v. City of Faribault, 292 N.W.2d 253, 256 (Minn. 1980).

But Hunkins' reliance on McShane is misplaced. There, the supreme court ruled that the McShanes were not first required to exhaust their administrative remedies by requesting a variance or a permit because under their particular circumstances, "a variance would neither be adequate nor appropriate relief." Id. Unlike Hunkins, the McShanes wanted to sell their property, rather than to develop it. Id. Therefore, they had no development plan

> upon which to base a request for a variance. [Alction on a request for a variance would have to wait until [the McShanes] could sell their property to a buyer with specific plans for it, and the marketability of the property would almost certainly be decreased because of the uncertainty. As a result, [the McShanes] are affected to their detriment by the zoning regulations even if a variance ultimately is granted.

Id. The supreme court also questioned the propriety of a variance for the McShanes allowing commercial use of the property upon its sale, noting that a variance "would be virtually impossible * * * without undermining the safety goals of the [airport zoning] regulations." Id.

In this case, such considerations do not play a role. More importantly, as developer of the property, Hunkins might easily have submitted development plans upon which the zoning board could have reached a final determination. But Hunkins never tested the City's commitment to its zoning regulations. Although he now contends the city "knew" the scope of his development plans, the law is clear that an actual plan must be submitted. Thompson, 455 N.W.2d at 516; see also McShane, 292 N.W.2d at 256 (zoning board needs "to consider specific plans") . Moreover, the record reflects that the City granted a

variance to a property owner operating a liquor store within the Technology Corridor; it might have done the same for Hunkins had he submitted a plan showing that his contemplated use of the property was compatible with the City's plan.(1)

> We agree, therefore, with the district court's holding that merely because plaintiffs feel they have been ignored and the zoning decision ran adverse to their stated desires * * * does not mean that seeking a final determination or a variance [was] futile.

---

(1)The district court noted that where a government acts as an enterprise, a compensable taking occurs if the property owner demonstrates that the government's regulation has caused a substantial diminution in the property's market value. Where a government acts as an arbitrator, a compensable taking occurs only if the government's decision results in the landowner losing all reasonable use of the property. Thompson v. City of Red Wing, 455 N.W.2d 512, 517 (Minn. App. 1990) (citing McShane v. City of Faribault, 292 N.W.2d 253, 258-59 (Minn. 1980)).

At trial and in this appeal, Hunkins correctly argued that, under these facts, the City acted in an enterprise capacity. Hunkins also contended that the City's down-zoning substantially diminished his property's market value. But neither of these contentions has any bearing on the district court's decision.

We further note that the purpose of the finality requirement is to force the decisionmaker to arrive at "a definitive position on

the issue that inflicts an actual, concrete injury." Williamson, 473 U.S. at 193, 105 S. Ct. at 3120.

DECISION

That Hunkins never obtained a final determination was undisputed. Therefore, the district court properly granted summary judgment.

Affirmed.

Judge Jack Davies
November 17, 1993

Supreme Court, U.S.
FILED

931849 APR 26 1994

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

STANLEY HUNKINS, individually
and d/b/a Muse Ten Center, et al.,

Petitioners,

vs.

CITY OF MINNEAPOLIS,
THE MINNEAPOLIS COMMUNITY DEVELOPMENT
AGENCY, and MINNESOTA TECHNOLOGY
CORRIDOR CORPORATION,

SUPPLEMENTAL APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Stanley Hunkins, individual
and d/b/a Muse Ten Center, and
Corridor Properties, Inc.,

Plaintiffs,

ORDER AND MEMORANDUM
File No. MC 91-21459

vs.

City of Minneapolis, a municipal
corporation; the Minneapolis Community
Development Agency; and Minnesota
Technology Corridor corporation, a
Minnesota corporation,

Defendants.

The above-entitled matter came on before the under signed Judge of District Court on October 29, 1992, pursuant to defendants' motion for summary judgment.

Michael Berens, Esq. and Mary Jahnke, Esq. appeared on behalf of plaintiffs; Michael Norton, Esq. appeared on behalf of defendant City of Minneapolis; James Dorsey, Esq. and Mark Simpson, Esq. appeared an behalf of defendant Minneapolis Community Development Agency; and Corey Ayling, Esq. appeared on behalf of defendant Minnesota Technology Corridor Corporation.

Based upon the arguments of counsel, memoranda, files, records, and proceedings herein, the Court makes the following:

ORDER

1. That defendants' motion for summary judgment is **GRANTED** in its entirety.

2. That the attached memorandum be hereby incorporated herein by reference.

LET JUDGEMENT BE ENTERED ACCORD-

INGLY.

BY THE COURT:

Beryl A. Nord
Judge of District Court

Dated: This 27th day of January, 1993.

MEMORANDUM

Facts:

This matter arises out of a rezoning decision made by defendant City of Minneapolis which plaintiffs claim adversely affects the value of the property they own within the rezoned area and amounts to a "taking" for which they must be compensated. The material facts are not in dispute. In June and August of 1983, plaintiff Stanley Hunkins purchased two parcels of land

in the Industry Square Development Area of Minneapolis. There were two buildings already on the properties and it was plaintiff Hunkins' intent to develop an office complex. He had plans to develop the property in phases for use as a "business incubator" where companies which were just starting out would rent office space and have access to on-site support services. Plaintiff Hunkins projected that as the businesses grew and needed more space he would create a core building and then renovate the second building to provide larger office space for the growing companies to move into.

In July 1984, plaintiff Hunkins received a building permit from the City to begin the initial construction of what would be known as Muse Ten Center. Prior to beginning construction, defendant City had recommended to the State of Minnesota that Muse Ten be given Enterprise Zone status. Pursuant to Minn. Stat. S469.166, this status can be given to development projects located in blighted urban areas. The Muse Ten project received

such status and as a result was entitled to certain tax exemptions and credits. Muse Ten opened its doors in December 1984.

Simultaneous to plaintiff Hunkins' negotiation for and purchase of the Muse Ten property, a Minneapolis Task Force on Research and Technology was at work studying the feasibility of developing a "Technology Corridor" to encourage the incubation and growth of scientific, technological, and research-oriented industry. The Task Force submitted a detailed recommendation for a Technology Corridor to the Mayor and the City Council on August 15, 1983. The location identified for the Technology Corridor in this recommendation was an area known as the Industry Square Development Area. The parcels of land which plaintiff Hunkins purchased were located in this area. The Task Force proposed, among other things, that the Minneapolis Community Development Agency ("MCDA") and the Minneapolis Planning Department, in cooperation with the University of Minnesota and the Industry Square Development Community,

prepare a development plan for the Technology Corridor. In February 1985, a comprehensive study on the Technology Corridor which had been prepared by defendant MCDA was adopted by defendant City.

On June 12, 1986, the Minneapolis City Council passed a resolution regarding the Minnesota Technology Corridor which reads in relevant part:

> WHEREAS, the City Council has established a technology corridor for the purpose of attracting high-technology and research activities and businesses; and
>
> WHEREAS, the regulations in existing zoning districts do not adequately protect and encourage the desired uses;
>
> NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MINNEAPOLIS:
>
> That the Minneapolis Planning Department is hereby directed to develop new zoning regulations and conduct a 40-acre study for the Technology Corridor...
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> Be it Further Resolved that no building permit shall be granted by the Director of Inspections or his agents in the affected area for a period of six months or

> until the completion of the 40-acre study and until the application has been reviewed by the City Council for compatibility with the Minnesota Technology Corridor Plan (Petn No. 234002), adopted by the City Council on February 8, 1985.

The Resolution was approved by Mayor Fraser June 19, 1986. The City Council subsequently extended the building permit moratorium to June 21, 1987, and on June 12, 1987, it was again extended by the City Council "for an additional six months, or until the completion of the rezoning study, which ever occurs first."

Before the moratorium was adopted, plaintiff Hunkins had already started renovation of the Muse Ten buildings. The City had already approved building plans that permitted plaintiff Hunkins to continue the rehabilitation of his buildings during the moratorium period. Moreover, additionally construction took place on the Muse Ten property during the moratorium period and a building permit was issued for the work.

In December 1986, the Secor Study was published. The

Secor Study was a study sponsored by defendant MCDA and defendant Minnesota Technology Corridor Corporation ("MTCC") to assist in the development of a Technology Corridor. The Secor Study proposed a 10 to 20 year course of action for development of the Technology Corridor and advocated a change in zoning as an initial step in the development.

On December 19, 1986, the City Council adopted three ordinances enacting Chapters 570, 571 and 572 of the Minneapolis Zoning Code. These Chapters set forth the text of the Technology Corridor zoning requirements. As was advocated in the Secor Study, the new zoning laws created two districts: the "IT" district which allowed technology intensive uses (as defined by the ordinance) and "TC" which allowed commercial uses supportive of technology intensive uses. In August 1987, the City set the zoning boundaries for the Technology Corridor which applied the zoning text to the specific property in the Corridor. Muse Ten was located in the "TC" district, surrounded by blocks

in the "T" zone.

During the period of time between the rezoning proposals and the enactment of the actual zoning ordinances, Randy Hamborg, President of plaintiff Corridor Properties, Inc., (the managing agent for the Muse Ten property at that time) registered his objections to the proposed zoning and how it would be applied to Muse Ten. He vocalized his objections at a meeting of the Planning and Zoning Committee on June 16, 1987 and memorialized his objections in writing to the Members of the Board of the MTCC in a letter dated June 22, 1987. Other landowners in the Technology Corridor area also objected to the rezoning.

On July 24, 1987, plaintiff Hunkins was notified by his lender that it no longer wanted to be part of the financing of the Muse Ten development. It cited as its reasons: 1) the lack of cash flow ,until the second building was rehabbed and the lack of funds available to accomplish it; 2) the proposed zoning changes

and 3) the short term leases of the current tenants and their limited financial strength.

It is unclear if the Muse Ten incubator office complex was a permitted use under the "TC" zoning ordinance or at the very least a legal nonconforming use. After the zoning was applied to the Technology Corridor in August 1987, plaintiff Hunkins did not submit a formal petition for rezoning, nor did he fill out a "permitted use" application or formally seek a zoning variance. Plaintiff never submitted a development plan to the City or in any formal way seek a governmental ruling that its use was nonconforming. Plaintiff Hunkins claims he submitted a development plan to the city in or around July 1984, and the City approved it. However, the exhibit plaintiff cites to is nothing more than a building permit issued for Muse Ten dated July 5, 1984.

In early 1988, Randy Hamborg requested approximately $3.9 million in funding from defendant MCDA to continue

development of the Muse Ten Center. On March 31, 1988, the MCDA denied the request for bond financing. In the spring of 1988, Hamborg asked the City to purchase the Muse Ten Property for $3,000,000. On May 23, 1988, the City rejected Hamborg's offer. After plaintiff Hunkins was unable to obtain other financing for the completion of the second phase of the development, he eventually sold Muse Ten, on December 28, 1988, to plaintiff Corridor Properties, the entity which had been managing Muse Ten for plaintiff Hunkins since 1985, for $1,350,000.

Throughout plaintiff Hunkins' attempts to refinance and/or sell Muse Ten, he continued to register his objections to the downzoning. Plaintiff Hunkins enlisted the help of City Council member Van White as well as U.S. Senator Rudy Boschwitz. On September 30, 1988, plaintiff Hunkins wrote a letter to Mayor Fraser outlining how his hopes for the Muse Ten Center had been crushed by the enactment of restrictive zoning, siphoning of

funds from the zone, and failure to carry out the mandate for development in the enterprise zone. Additionally, an October 4, 1988, plaintiff Hunkins registered his objections to the restrictive zoning with the Commissioner of Trade and Economic Development.

With respect to real estate taxes on the Muse Ten prop erty, plaintiffs admit that the only taxes they paid were the real estate taxes for the first half of 1986. Otherwise, Muse Ten has not paid its property taxes from 1986 through 1991. When plaintiff Hunkins failed to pay Muse Ten's real estate taxes due in 1986, Hennepin County notified plaintiff Hunkins that a judgment would be entered against Muse Ten for the unpaid taxes. On April 17, 1987, a tax judgment was entered against Muse Ten for non-payment of real estate taxes in 1986. No steps were taken to prevent the entry of that judgment or to appeal the judgment. The back taxes owed to the County total $577,513.00 in current and back property taxes, penalties and interest.

On April 9, 1991, defendants assert Muse Ten was forfeited to the State of Minnesota for nonpayment of real estate taxes. Whether this forfeiture was effective is the subject of a separate lawsuit. The county maintains it complied with all of the legal requirements for the tax forfeiture and that therefore title to the property is now vested in the State. Plaintiffs assert the service was improper and that the statute under which the State purportedly seized the Muse Ten property is unconstitutional. Since the forfeiture action, defendant MTCC and MCDA as well as other government officials have made inquiries into acquiring ownership of the properties.

In November 1991, plaintiffs commenced this 5 count lawsuit. Count I alleges a violation of 42 U.S.C. S1983 based upon an alleged deprivation of due process rights. Count 11 is a due process and unlawful taking claim based upon alleged violations of Article 1, S52 and 13 of the Minnesota Constitution. Count III bases those same claims upon alleged violations

of the United States Constitution. Counts IV and v are conspiracy claims based upon alleged violations of 42 U.S.C. S1983 and Article 1, SS2 and 13 of the Minnesota Constitution, respectively.

Defendants now come before this court seeking summary judgment. They first argue that this Court does not have jurisdiction over plaintiffs' takings claims because plaintiffs failed to obtain a final zoning determination from the City, and did not bring an action seeking injunctive relief. With respect to the Federal claims brought under the U.S. Constitution and 42 U.S.C. S1983, defendants also assert that not only should they be dismissed because plaintiffs did not satisfy the finality requirement, they must be dismissed because plaintiffs did not pursue their state law remedies. Irrespective of the ripeness issues, defendants also argue that this action must be dismissed on the merits as well. Defendants conten[d] that since the zoning ordinance did not deprive plaintiffs of all reasonable uses of their

property, it did not effect a "taking." Defendants aiso argue that plaintiffs' section 1983 and conspiracy claims must be dismissed as derivative. Lastly, defendants maintain that regardless of how the court views its other arguments, defendant MTCC and plaintiff Corridor Properties must be dismissed as improper parties.

Rule 56 of the Minnesota Rules of Civil Procedure allows a court to enter summary judgment as a matter of law when it has been shown there are no genuine issues as to any material facts. Gaspord v. Washington County Planning Commission, 252 N.W.2d 590, 591 (Minn. 1977). A material fact is one of such a nature as will affect the result or outcome of a case depending on its resolution. Zappa v. Fehey, 310 Minn. 555, 245 N.W.2d 258, 259 (1976). In order to oppose a motion for summary judgment, the non-moving party must demonstrate at the time of the motion that specific material facts exist which create a genuine issue for trial. Hunt v. IBM MidAmerican Employees Federal credit

Union, 384 N.W.2d 853, 855 (Minn. 1986). The opposing party has the benefit of that view of the evidence most favorable to it. Sauter v. Sauter, 244 Minn. 482, 484, 70 N.W.2d 351, 353 (1955). In addition, all doubts and factual inferences must be resolved against the moving party. Anderson v. Twin City Rapid Transit Co., 250 Minn. 167, 186, 84 N.W.2d 593, 605 (1957).

Ripeness:

Defendants' first argument is that this Court does not have jurisdiction over plaintiffs' takings claims because plaintiffs failed to obtain a final zoning decision from the City and did not bring an action seeking injunctive relief. It is defendants' position that plaintiffs were under an obligation to obtain a final determination from the City as to how the zoning ordinances would affect their property. Thereafter, defendants argue, if the final determination prevented plaintiffs' development plans, plaintiffs were required to file an action for injunctive relief. Having failed to even seek a final determination as to how the

City would apply the zoning restrictions to plaintiffs' property, let alone file for injunctive relief, defendants assert plaintiffs' taking claims must be dismissed.

Plaintiffs argue a number of things, however, the essence of their argument is that the city was well aware of the negative effects downzoning would have on plaintiffs' property and that given that knowledge, the City's imposition of the downzoning on Muse Ten was a final zoning determination. Plaintiffs claim that it was at that point that the City demonstrated it had arrived at a final, definitive position regarding how it would apply the zoning and that any further action on their part would have been futile and therefore, unnecessary. This court cannot agree with plaintiffs.

The question of what constitutes a taking for purposes of the Fifth Amendment has never been an easy question for the courts to grapple with. Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 123, 57 L.Ed.2d 631, 98 S.Ct. 2646

(1978). However, the United States Supreme Court has consistently indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. Id. at 124, 57 L.Ed.2d 631, 98 S.Ct. 2646.

Notwithstanding the Supreme Court's acknowledgment of the importance of those factors, the Supreme Court has consis tently held that "[t]hose factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." Williamson Planning Comm´n v. Hamilton Bank, 473 U.S. 172, 191, 87 L.Ed.2d 126, 141, 105 S.Ct. 3108 (1985). "A claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." Id. at 186, 87 L.Ed.2d 126,

139, 105 S.Ct. 3108; Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.-S. 264, 297 (1981). As the Supreme Court explained in MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 91 L.Ed.2d 285, 106 S.Ct. 2561 (1986):

> [A regulatory taking claim] has two components. First, appellant must establish that the regulation has in sub stance "taken" his property--that is, that the regulation "goes too far." Second, appellant must demonstrate that any proffered compensation is not "just."
>
> It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes.

Id. at 348, 91 L.Ed.2d 285, 294, 106 S.Ct. 2561.

In Minnesota, the Court of Appeals dealt with the ripe ness issue in Thompson v. City of Red Wing, 455 N.W.2d 512 (Minn. App. 1990). The court cited the MacDonald and Williamson cases when it found that "[e] conomic impact and

interference with expectation interests cannot be evaluated until after a final application of the regulations to the land in question." Thompson at 516. The Thompson court also noted that "(a] challenge to the application of a regulation is not ripe when the landowners have not submitted a development plan." Id.; Furthermore, a "takings claim is also not ripe where only one plan is rejected and no other plan is proposed." Id.; see Williamson, 473 U.S. at 186-95 (requiring request for and denial of zoning variance before inverse condemnation action is ripe).

Moreover, this finality requirement applies regardless of the manner in which the regulatory taking claim is framed - whether as a violation of the Just Compensation Clause, the Due Process Clause, or 42 U.S.C. 1983. Williamson, 473 U.S. at 197-200. As the Williamson Court stated:

> Viewing a regulation that "goes too far" as an invalid exercise of the police power, rather than as a "taking" for which just compensation must be paid, does not resolve the difficult problem of how to define "too far," that is, how to distinguish the point at which regulation becomes

> so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession. As we have noted, resolution of that question depends, in significant part, upon an .analysis of the effect the Commission's application of the zoning ordinance and subdivision regulations had on the value of respondent's property and investment-backed profit expectations. That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property.

Id. at 199-200, 87 L.Ed.2d 126, 147, 105 S.Ct. 3108. As defendants point out, all five counts of plaintiffs' complaint allege, at root, a taking in violation of either the Just Compensation Clause or the Due Process Clause.

It is clear that in the instant case, plaintiffs' claims are not ripe and defendants' motion for summary judgment must be granted. There is no dispute here that plaintiffs have not followed the procedures which were available to get a final determination as to how the "TC" designation would be applied to their property. Plaintiffs have not argued that adequate procedures were unavailable to obtain a final determination. In fact, a special

procedure had been adopted by the Minneapolis City Council with respect to applications for zoning determinations in the Technology Corridor. All applications were referred to the MTCC for comment, then the Zoning Administrator would make a determination that could be appealed to the Board of Adjust ment and Appeals, and finally to the Minneapolis City Council. Plaintiffs took none of these steps.

Plaintiffs argue that the finality requirement has been met because the City had come to a definitive position regarding how it was going to apply the zoning regulations. Plaintiffs point out that throughout the entire time the defendants were considering the downzoning, plaintiffs were actively attempting to educate the government about the devastating effect the proposed regulations would have on the Muse Ten project. Plaintiffs contend that the defendants knew exactly what the effect on Muse Ten would be, but, downzoned the area anyway. Plaintiffs cannot imagine how anything they may have done would have changed

the collective mind of the City Council with respect to the downzoning.

Plaintiffs miss the point of the finality requirement. The object of a finality determination is not to force plaintiffs to jump through some administrative hoops, it is to force the decision-maker to arrive at a definitive position on the issue that inflicts an actual, concrete injury. Williamson, 473 U.S. 172 at 193. In the instant case, this court has no way of measuring-the impact of the zoning ordinance on plaintiffs' property. Plaintiffs claim that all was lost in August of 1987 when the City applied the zoning ordinances. However, this court has no way of knowing that. While it is fairly clear that the downzoning adversely affected plaintiffs' plans for Muse Ten, it is not at all clear to what extent. Plaintiffs claim that it could not move to the next phase in its development of the Muse Ten complex because it would be non-conforming. Yet, there was never a determination that it would be nonconforming because it was

never submitted for such a determination. Plaintiffs argue that the downzoning limited Muse Ten's leasing possibilities by forbidding new nonconforming tenants. Again, that issue was never submitted. Indeed, no development plan was ever submitted to the City after the zoning change. Plaintiffs argue that they submitted a development plan in 1984 and that the City was well aware of their plans for Muse Ten. However, given the holding in Thompson supra, regarding submissions of development plans, it is somewhat disingenuous to argue that a development plan submitted in 1984 would be sufficient under the circumstances.

Plaintiffs spent a great deal of time arguing that this court must not consider this case in a vacuum - that it must look at all the facts to recognize how different the instant fact situation is from the other cases wherein the courts required the parties to seek a final determination. But, this court fails to see how these plaintiffs are any different from any other landowner who is

aggrieved by a rezoning decision. This court cannot imagine that any number of zoning decisions are not met by staunch opposition with avid lobbying pro and con throughout the consideration process. Indeed, it would be ludicrous to assume that any regulatory agency would make such important decisions without asking for input and thoroughly weighing the pros and cons. In the instant case, merely because plaintiffs feel they have been ignored and the zoning decision ran adverse to their stated desires, it does not mean that seeking a final determination or a variance is futile. It should be remembered that the City rezoned a rather large area to embark on a long-term project which was just beginning. How committed the City was to the guidelines of the Secor Study was never tested. What the City interpreted the zoning definitions to encompass was likewise never tested. This court has no way of knowing what property rights plaintiffs have lost. It is worth noting that at least one other property owner in the area sought to improve an already existing structure,

a liquor store, and it was approved. Plaintiffs failed to get a final determination as to how the zoning would affect their property, therefore, their claims are not ripe and the Complaint must be dismissed.

Injunction:

The Minnesota Supreme Court in McShane v. City of Faribault, 292 N.W.2d 253, 259 (Minn. 1980), recognized the use of an injunction against enforcement of an ordinance as a proper remedy for landowners whose property has been taken by virtue of inverse condemnation. Inverse condemnation is when property is taken for public use absent a formal condemnation proceeding. Alevizos v. Metropolitan Airport Comm´n, 298 Minn. 471, 216 N.W.2d 651 (1974). In McShane, the property owners had sought relief from an airport zoning ordinance by use of mandamus. The McShane court, noting that mandamus was an inappropriate remedy where there was a plain, speedy, and adequate remedy in the ordinary course of law, found that an

injunction against enforcement of the ordinance would provide the appropriate remedy. McShane, 292 N.W.2d at 259. The court noted, "[the city] would then have the option of repealing the ordinance or retaining it and initiating eminent domain proceedings to compensate plaintiffs for its effects." It further stated, "[o]nly where the taking or damage is irreversible, would an injunction against enforcement not provide an adequate remedy." Id.

Accordingly, the appropriate remedy in this case was to bring an action to enjoin the zoning ordinance after plaintiffs had obtained a final zoning determination that restricted their development plan. If plaintiffs had been successful in such an action, and the City decided to keep the zoning in effect, the City could then be compelled by writ of mandamus to institute condemnation proceedings. If the City decided to repeal the zoning ordinance, plaintiffs could obtain damages for a temporary taking of property. See First Lutheran Church v. Los Angeles County, 482

U.S. 304, 96 L.Ed.2d 250, 107 S. Ct. 2378 (1987).

Plaintiffs argue again that it would have been futile to seek an injunction since the damage was irreversible at the time the City enacted the zoning ordinances. Plaintiffs again argue that the defendants were well aware of the impact their actions would have had on Muse Ten's value and that there is no reason to believe that an injunction, on top of every other action that the plaintiffs had taken, would have caused the downzoning to be repealed. However, that argument belies their continuing attempts, well into 1991, to change that zoning. It also does not take into account the economic realities which the City Council would have been forced to face up to had plaintiffs successfully brought an injunction. Where the damages are not irreversible, an action for injunctive relief is the appropriate remedy.

Plaintiffs have included a prayer for mandamus to compel condemnation proceedings in the ad damnum clause of their Complaint. However, without even determining whether it is

properly pled or supported, a mandamus count cannot be asserted until: (1) the plaintiffs prevail on an action to enjoin the ordinance, and (2) the City decides that it wants to keep the ordinance in effect. It is at that point that a writ of mandamus would be appropriate to compel condemnation proceedings.

Pursuit of State Remedies:

Assuming, for the sake of argument, that plaintiffs' claims are ripe for review and that an injunction was not a necessary step before initiating this suit, it is clear to this court that Counts I (Violation of 42 U.S.C. S 1983), III (Violation of Fifth Amendment to U.S. Constitution) and IV (Conspiracy to Violate 42 U.S.C. S1983) must be dismissed because plaintiffs did not pursue their state law remedies.

In Williamson, the United States Supreme Court decided that a landowners' claim under the U.S. Constitution and 42 U.S.C. S1983 for a taking of property without just compensation was not ripe where state law procedures were available

to obtain just compensation. With respect to claims brought under the Fifth Amendment, the Court held: "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield(s] just compensation,' then the property owner 'has no claim against the Government for a taking.'" Williamson, 473 U.S. at 194-195. "[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." Id. at 195.

Since Williamson, courts have dismissed federal takings claims under the United States Constitution and 42 U.S.C. S1983 when the state has adequate procedures for obtaining just compensation. See Estate of Himmelstein v. City of Fort Wayne, Ind., 898 F.2d 573, 576 (7th Cir. 1990) (taking claim under 42 U.S.C. S1983 not ripe where adequate state law remedies exist) and Queen Anne Courts v. City of Lakeville, 726 F-Supp. 733,

739 (D. Minn. 1989) (section 1983 claims not ripe because plaintiff had not pursued adequate Minnesota state law remedies).

In the instant case, plaintiffs had adequate state remedies when the zoning became effective in August 1983. After obtaining a final zoning determination that restricted plaintiffs' development, plaintiffs could have brought an action to enjoin the ordinance, and, if successful, they could have obtained damages for a temporary taking, or a writ of mandamus compelling condemnation proceedings. None of these actions were taken.

Plaintiffs' current standing to bring a state action for injunction is questionable given the tax forfeiture. However, that does not make their state law remedies inadequate. As the Williamson Court stated: ". . . all that is required is that a 'reasonable, certain and adequate provision for obtaining compensation' exist at the time of the taking." Id. at 194.

The time for determining whether plaintiffs' state law remedies were adequate was August 1987 - the time of the alleged taking - and at that time they were. Accordingly, plaintiffs' federal claims must be dismissed.

Compensable Taking:

Assuming, for the sake of argument, that this matter is appropriate for determination, defendants still contend that this matter must be dismissed because the City did not engage in a compensable taking. This court believes that there are factual matters in dispute which would make this inappropriate for summary judgment.

In Parranto Bros. v. City of New Brighton, 425 N.W.2d 585, 590 (Minn. App. 1988) the Minnesota Court of Appeals set forth the factors which can be analyzed to determine whether a compensable taking has occurred. The Parranto court recognized that the United States Supreme Court has applied two different tests. Id. at 591.; See Actins v. City of Tiburon, 447 U.S. 255,

65 L.Ed.2d 106, 100 S.Ct. 2138 (1980) and Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 89 L.Ed.2d 166, 106 S.Ct. 1018, (1986). However, the Parranto court was unclear as to what circumstances dictated the use of one test over the other, and accordingly, set forth both analyses. Id. at 591-592.

The Agins analysis weighs private and public interests and asks the following questions: 1) does the zoning decision substantially advance a legitimate state interest; and 2) has the landowner been denied economically viable use of his land. Agins, 447 U.S. at 260. The Connolly Court identified three factors which have particular significance. Connolly, 475 U.S. at 224. Those factors are: 1) the economic impact of the regulation on the claimant; 2) the extent to which the regulation has interfered with distinct investment-backed expectations; and 3) the character of the governmental action. Id. The economic impact of the city's downzoning is a material question of fact that is in dispute and is essential to a determination under either

the Agins or the Connolly analysis. As such, the matter is inappropriate for a summary judgment determination.

Derivative Claims:

Defendants argue yet another alternative theory for summary judgment with respect to plaintiffs' claims under 42 U.S.C. S1983. Defendants contend that plaintiffs' section 1983 claims must be dismissed as derivative of and contingent upon a just compensation claim that is without substantive merit. Given that this court has declined to find that plaintiff's claim is without substantive merit, there is no need to address this argument.

MTCC as a Proper Party:

Defendants argue that even if plaintiffs' eminent domain claims are deemed to have sufficient merit to withstand summary judgment, MTCC must be dismissed since it is a private non-profit corporation and that the right of just compensation lies against the public body which has taken the claimant's property. With respect to plaintiffs' takings claims this court would agree.

An unconstitutional taking is a governmental action or inaction. Czech v. City of Blaine, 312 Minn. 535, 539, 253 N.W.2d 272, 274 (1977). Defendant MTCC is not a governmental body and is not the source of the zoning regulation that plaintiffs believe deprived them of their property.

With respect to the conspiracy claims, plaintiffs argue that defendant MTCC is a proper party because it participated in the conspiracy to downzone. However, as defendants point out, under 42 U.S.C. S 1983, private parties who conspire to deprive a party of his or her civil rights must do so "under color of state law." Since MTCC did not pass any zoning ordinances, it is difficult to see how it was acting under color of state law. Defendant MTCC is not a proper party to this action and must be dismissed.

Corridor Properties as a Proper Party:

Plaintiff Corridor Properties is not a proper party to this action. It is undisputed that the alleged taking in this case

occurred in August 1987 when the zoning became effective. Corridor Properties did not acquire an interest in Muse Ten until it purchased the property from plaintiff Hunkins in December of 1988. Since Corridor Properties did not have an interest in the property on the date of the alleged taking, it does not have a claim for inverse condemnation. See Victor Company v. State, 290 Minn. 40, 45, 186 N.W.2d 172 (Minn. 1971) (party lacks standing to assert inverse condemnation claim when it did not have an interest in the property on the date of the alleged taking.) Defendants argue that the taking first occurred in August 1987, but the taking or damaging continued after that date. Defendants cite no authority for its proposition that there can be a continual taking. The law is clear. Plaintiff Corridor Properties is an improper party and must be dismissed.

B.A.N.